The language of the application, after describing the property proposed to be purchased, is as follows: "And I am prepared to pay *the amount so paid for its purchase, and all subsequent taxes, penalties, costs and levies.*" This is a plain declaration by the applicant that he is prepared to pay the amount the Commonwealth had paid for the land, together with all subsequent taxes, penalties, costs and levies, and I am inclined to regard the language used, broad enough to cover all demands of the State under and by virtue of the statute. The majority of the court is, however, of opinion that it was only necessary for the applicant to declare his readiness to pay the amount required by law, and that inasmuch as he has undertaken to specify what he will pay, and has failed to say he is prepared to pay the interest on the State's demand, provided for by the statute, the application is, therefore, not a substantial compliance with the terms of the act, and the petitioner entitled to redeem, without paying the five dollar penalty, and the costs incident to filing the application.

For this reason the writ prayed for must issue.

Mandamus awarded.

DOOLEY V. CHRISTIAN, CLERK.*

Supreme Court of Appeals: At Richmond.

January 12, 1899.

1. DELINQUENT LANDS PURCHASED BY COMMONWEALTH—*Application to purchase—Previous owner.* Where land has been sold for delinquent taxes and purchased by the Commonwealth it cannot be again sold for taxes, until it has been redeemed, and if, being still unredeemed, it is subsequently sold and conveyed to the purchaser it should not be transferred to the purchaser on the books of the Commissioner of the Revenue, but if so transferred and returned delinquent in his name and sold for taxes, the owner, at the date of the first sale, still has the right to redeem, and any applicant to purchase under section 666 of the Code, as amended by the Act of February 11, 1898, must proceed under the first sale and give notice to the owner at that time, as provided by said act. He is the "previous owner" contemplated by the act and may redeem without paying the five dollars penalty prescribed by that act until a proper application to purchase is filed in which he is named as the previous owner.

Original application for a *mandamus.* *Mandamus awarded.*

W. F. Brown, for the petitioner.

W. H. Werth, for the respondent.

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* Reported by M. P. Burks, State Reporter.

BUCHANAN, J., delivered the opinion of the court.

This is an application to this court for a *mandamus* to compel the clerk of the Hustings Court of the City of Richmond to accept the sum tendered by the petitioner under section 664 of the Code, as amended by Acts 1897–8, p. 513, in redemption of a certain parcel of land sold for the non-payment of taxes.

There is no controversy between the petitioner and the clerk as to the material facts of the case, which are substantially as follows:

The land, which was located in the City of Richmond, was returned delinquent for the non-payment of taxes for the year 1886, and sold therefor in the year 1888, and purchased by the treasurer of the city for the State. The sale was reported by him to the Hustings Court of the city, confirmed, and entered of record as required by law.

The land was for the next year reported by the treasurer as having been theretofore sold, and his report confirmed and recorded. It was assessed for taxes in petitioner's name for both of these years (1886 and 1887).

In the year 1894 it was returned delinquent for the non-payment of taxes for that year, in the name of one Vaughan, who had acquired through sundry conveyances, such title as remained in the petitioner after it had been sold in his name to the Commonwealth as above set forth. At that sale the treasurer bought it in the name of the Auditor for the benefit of the State and city. His report of the sale to the court was also confirmed and entered of record.

After the expiration of two years after the last mentioned sale, one Glenn filed his application to purchase the land from the Commonwealth under section 666 of the Code as amended, and proposed to pay therefor the amount for which the land was sold in the year 1896, when standing in the name of Vaughan, together with such additional sums as may or would have accrued for taxes and levies, with all interest provided by law, had not the land been sold and purchased by the Commonwealth. He gave notice of his application to purchase to Vaughan and a creditor, or creditors, who appeared by the record to have a deed of trust upon the land. Within four months from the time notice was served under Glenn's application to purchase, the petitioner, for the purpose of redeeming the land, applied to the clerk for a statement of "the amount for which said sale in petitioner's name was made, together with such additional sums as would have accrued from taxes and levies if the said land had not been purchased

by the Commonwealth, with interest on the amount for which the sale was made at the rate of six per cent. per annum from the day of sale, and on the additional sums from the fifteenth day of December in the year in which the same would have accrued, and also his, said clerk's, fee for making such statement, for calculating interest and so forth." The clerk in response to that application furnished the petitioner a statement showing that the unpaid taxes upon the land, together with interest and costs, independent of Glenn's application to purchase, were $2.77, and that the penalty and costs which had accrued by reason of Glenn's application amounted to the sum of $9.03. The petitioner tendered the $2.77, but the clerk refused to accept anything unless he paid the whole amount shown to be due by the statement furnished. This the petitioner declined to do and instituted this proceeding.

The clerk bases his refusal to receive the sum tendered in redemption of the land upon two grounds.

1. That the amount tendered did not include the penalty and costs which had accrued thereon by reason of the application of Glenn to purchase the land from the Commonwealth under section 666 of the Code, as amended by Acts of 1897–8, p. 343.

2. That the petitioner was neither "the owner (of the land), nor his heir, assign or creditor," and was, therefore, not entitled to redeem.

We will first consider the right of the petitioner to redeem the land, for if he is not one of the persons authorized to redeem, it will be unnecessary to consider the other question.

Section 664 of the Code, as amended by act of March 24, 1898, Acts of Assembly 1897–8, pp. 513–4, provides by whom real estate purchased by the State for the non-payment of taxes may be redeemed. Those who are given this right are "the previous owner, his heirs or assigns, or any other person having the right to charge the same with a debt."

The person described as the previous owner of the land clearly means the person in whose name the land was returned delinquent when the State became the purchaser. This is evident from the provisions of sections 469 and 662 of the Code.

By section 469 the commissioner of revenue was required to note on his land-book all real estate which is sold for taxes, either to a private individual or to the State, the number of acres therein and to whom sold, and to continue the whole tract upon his land-book in the name

of the former owner until the purchaser obtains a deed therefor, or until the owner sh ll redeem the same from the Commonwealth.

By section 662 it was provided that when any real estate is offered for sale, as provided for in section 638, and no person bids the amount charged thereon, the treasurer shall purchase the same in the name of the auditor for the benefit of the State, county, city or town respectively, unless such real estate has been previously purchased in the name of the auditor, in which case it shall be sold for such price as it will bring.

If the commissioner of the revenue and the treasurer had done their duty under these sections, such a condition of things as exists in this case could not have arisen. But for the commissioner's misconduct in transferring the land on his land-book from the name of the petitioner to that of Vaughan, the treasurer would not have been engaged in the folly of buying for the State lands which it had purchased six years before, and which had neither been redeemed nor purchased from it. The land would still be on the land-books, as it ought to be, in the name of the petitioner, and if it were, would any one doubt that he was the previous owner referred to in section 664, and had the right to redeem? How, then, can he be deprived of that character and that right by a violation of law on the part of the officers of the State?

This construction is strengthened by the provisions of section 666 of the Code as amended. That section provides, among other things, that nothing in it shall be construed as in any way affecting the duties of the commissioner of the revenue as prescribed by section 469, and that the party who desires to purchase such land from the Commonwealth, shall state in his application the person in whose name it stood at the date of the sale thereof to the Commonwealth, and also the person in whose name it stands at the date of the application, in the event that it has been transferred contrary to the provisions of section 469. It would seem from this that the legislature intended that the original owner, in whose name it was first sold to the Commonwealth, should have notice of the application, because at the time it was sold in his name he was the owner, and the only owner, of the land known to the Commonwealth, and because without a violation of law it could not be transferred to another upon the land-books until it had been redeemed or purchased from the Commonwealth in the manner prescribed by law. The legislature also intended that the person in whose name it was standing at the time the application was filed should have notice of it, although transferred to his name in violation of sec-

tion 469, because, being in his name at that time, he was very probably in possession of the land, and deeply interested also in its redemption. But by providing for such notice it was not intended to recognize the validity, either of the transfer of the land or of any sale of it made in his name after the illegal transfer, and whilst the Commonwealth was the owner of the land under its purchase in the name of the person from whom it had been illegally transferred. To hold that the person described as "the previous owner" in sections 664 and 666 of the Code, as amended, was any other than the person in whose name the land stood when the Commonwealth purchased it for the non-payment of taxes, the amount of which has never been paid, would defeat the chief object for which the latter section was enacted. It would enable the applicant who proposes to purchase the land to get the Commonwealth's title to it by paying not what was due the Commonwealth and city at the time the land was sold to the Commonwealth, and all additional sums which would have accrued thereon since that time with its interest, but by paying only the amount for which the land was illegally sold in the name of some one holding under the original owner, and the additional sums which would have accrued since that time, leaving unpaid all sums due thereon prior to and not included in the amount for which the last sale was made. Such a construction would offer a premium to purchasers to defeat the Commonwealth in the collection of her revenue, and enable them to get title to her lands for less than the taxes and levies and additional sums due thereon, and for less even than she requires the owner, in whose name they were originally forfeited, to pay in order to redeem them.

We are of opinion, therefore, that the petitioner had the right to redeem the land, and that he had the right to redeem it upon the terms and conditions prescribed in section 664 of the Code as amended, and that the clerk had no right to demand of him the payment of the costs, fees and penalty which section 666 of the Code as amended provides shall be collected for the benefit of the party who has filed an application to purchase under that section. Such costs, fees and penalty can only be collected from the party redeeming where the application to purchase is filed in accordance with that section.

The prayer of the petitioner must be granted.

Mandamus awarded.

NOTE.—The numerous applications all over the State to purchase lands previously purchased by the Commonwealth for delinquent taxes, and the number

and importance of the questions which have been raised, seem to justify the publication of everything the Court of Appeals has to say on the subject. Thus far the REGISTER has published every opinion on the subject promptly after its delivery.

There is nothing in the principal case or the two which precede it which seems to require or warrant comment. Most of the points raised seem to be comparatively free from doubt, and the conclusions reached entirely sound.

The Act under which these cases arose was approved February 11, 1898, and is to be found in the Acts of 1897–'8, page 343. The principles of the Act seem, in the main, to be right and just, but its length and method of expression are somewhat confusing. It is right and just that every land-owner should pay the taxes on his land, and every other tax-payer in the Commonwealth is interested that he should be made to do so. Land-owners had learned that it was not a very serious matter to have their lands purchased by the Auditor, as they were simply held by the State without sale, and the former owners continued to occupy and enjoy them without the payment of taxes. Under these circumstances the legislature found it necessary to take some more active measures to secure purchasers for these lands and thereby insure the collection of taxes due to the State. The result was the Act in question, and now, all over the State, the clerks' offices are besieged with persons anxious to pay their delinquent taxes.

Whether the $5 penalty was a wise or unwise provision it is not our purpose to inquire. The Act needs some substantial changes, and amongst them we suggest the following:

1. A cheaper and more expeditious method of determining the questions which arise under it, especially whether the owner is liable to the penalty of $5 imposed for the benefit of the applicant to purchase. Many of the questions can be tested by *mandamus*, and this remedy is both cheap and expeditious, but there are other cases in which *mandamus* will not lie; for instance, where the owner has paid all of his taxes and has his tax tickets. We know of one such instance. We suggest as a remedy a motion in the County or Corporation Court to quash the application for any errors appearing on its face, or that may be shown to exist therein, or for any cause that disentitles the applicant to purchase.

2. The applicant should be required to pay the whole purchase price in cash when he files his application, or at least to give good security for it. Cash was required under the Act of 1896, and it was said that this was in accord with the settled policy of the State on the subject. *Brooke* v. *Turner*, 95 Va. 696.

3. The applicant ought not to be entitled to the $5 penalty "as soon as his application is filed," but only after the notices required by the Act have been issued and placed in the hands of an officer to be executed, or other proper steps taken to secure service. The purpose of the Act is being frustrated and its privileges abused. A large number of applications are *filed* with the clerk with direction not to issue the notices until further ordered. The manifest object of this is to secure the penalty from all who seek to redeem without hazarding even the costs of copies. The State loses the benefit of the stimulus given by the service of the copies. The application should stand dismissed *ipso facto* unless within ten days from the filing some steps are taken to secure service on the owner.

4. Some tracts of land are returned delinquent because of the failure of the treasurer or his deputies to discharge their duties. Heavy penalties are imposed

on a treasurer for his neglect of duty in this respect, but usually these are recoverable only at the suit of the Commonwealth. When a motion is made to quash an application to purchase, the owner might be allowed the right to make the treasurer a party where the defence is the neglect of the treasurer to discharge his duty in the collection of the revenue, and if it be *plainly* shown that he has been guilty of gross negligence, he might be made to pay the *costs and penalty*, but in no case the taxes and interest. This remedy, however, is liable to great abuse and might subject treasurers to great annoyance and expense. It is probable that the privilege of making him a party and of subjecting him to the payment of the costs and penalty should be restricted to the case where the taxes have been paid and yet the land returned delinquent.

5. When more than one application is made to purchase the same tract, a speedy and cheap method should be given the applicants to test the validity of each other's applications without expense to the owner, or the owner should be allowed to test all applications in one proceeding, to which all applicants should be made parties. The owner should not be harrassed by two proceedings for the same cause of action, nor should he be put to the hazard of determining between two or more applicants which has the first valid application. This is no imaginary trouble. We know of a number of cases in which two applications have been filed for the same land. The second applicant deemed the first application fatally defective and hence filed application to purchase the land.

Other suggestions have occurred to us, but they are, in the main, of minor importance. It seems to us that the Act should be amended and perfected, rather than repealed, for every one recognizes the fact that taxes are not "equal and uniform" unless there is uniformity in the collection as well as in the imposition.

M. P. BURKS.

MOORE V. TRIPLETT.*

Supreme Court of Appeals: At Richmond.

January 12, 1899.

1. SALE OF LAND IN CONSIDERATION OF PAYMENT OF DEBTS OF GRANTOR—*Liability of purchaser—Liability of the land.* Where a debtor sells and conveys his land to a purchaser who assumes the payment of certain debts of the vendor in consideration of the conveyance, the purchaser becomes personally responsible for the payment of the debts, and, as between him and his vendor, is primarily liable. In such case the grantee not only becomes personally and primarily bound for the debts, but, if they are not paid, the land itself may be subjected to their payment in the hands of the grantee, or his representatives, or his voluntary alienee. Courts of equity look upon the transaction as in the nature of a trust.

2. CHANCERY PRACTICE—*Judicial sales—Confirmation—Discretion.* Whether a judicial sale should be confirmed or not depends upon the circumstances of the particular case. The court should exercise a sound legal discretion with

*Reported by M. P. Burks, State Reporter.